

1 Proceedings

2 simply a method of financing. I think that
3 is something that has been lost in the
4 various arguments. This is not a case where
5 you have individual obligations that are kind
6 of floating around. What you have in place
7 is facilities Enron can draw on every time a
8 letter of credit is issued. Even if the
9 letter of credit is not drawdown, it reduces
10 the credit limit, and there is no question
11 that Enron is directly obligated each time a
12 letter is issued and ultimately for a
13 drawdown.

14 So in that context, Baupost
15 basically has made two arguments in their
16 1987 Indenture. The first is somehow that
17 the letter of credit is not an instrument
18 under the 1987 definition of "Senior
19 Indebtedness." We have cited, Your Honor,
20 the cases on that. It is just wrong. A
21 Reimbursement Agreement is a contract and it
22 is an instrument. There is a Second Circuit
23 case that discusses that, the Red Rock case
24 cited at page 18 of our objection. Letters
25 of credits are instruments and are routinely

1 Proceedings

2 seen as such. Those cases are cited at page
3 19. So I think that there is no intent in
4 this definition to somehow limit "instrument"
5 to negotiable instrument. There is nothing
6 that would indicate that in anyway, shape, or
7 form. An instrument is an instrument and
8 these clearly are.

9 The argument that they press more
10 today and on reply deals with an exclusion to
11 the definition of indebtedness contained in
12 the 1987 Indenture. I just want to look at
13 that briefly for a moment. It is the
14 exclusion to the term of what indebtedness
15 is, where it excludes indirect guarantees or
16 other contingent obligations in connection
17 with the indebtedness of others. Then it
18 gives some examples of what these kinds of
19 things would be: agreements to purchase or
20 repurchase obligations of such other persons,
21 agreements to advance or supply funds to or
22 invest in such other persons, take-or-pay,
23 keep-well, make-whole, cash deficiency,
24 maintenance of working capital or earnings or
25 similar agreements.

1 Proceedings

2 A Reimbursement Agreement simply
3 doesn't fall within any of that class of
4 exclusion. It is a direct obligation by
5 Enron to the Banks. It is not guaranteeing
6 other third parties' performances. It is in
7 no way other third parties' beneficiary. It
8 is basically a financing tool used by Enron,
9 one to which their obligation to payback is
10 absolute, unconditional and irrevocable.

11 I just wanted to give one example,
12 which I think is helpful. In essence, under
13 the reasoning that Baupost gives, a revolving
14 line of credit would be a contingent
15 obligation. Because you have the same thing.
16 You have a line of credit of \$1 billion
17 hypothetically, and at any point in time half
18 of it can be drawn down and half of it may
19 not be drawn down. It may be used for third
20 party purposes or not. It really doesn't
21 matter. The fact of the matter is you have
22 got a commitment out there and the Banks have
23 to honor it, and if Enron draws on it, the
24 obligator then has to pay back. So I think
25 clearly the letters of credit under the 1987

1 Proceedings

2 Indenture are Senior Indebtedness.

3 Just briefly as to the TOPRS

4 Indentures, again, TOPRS definition requires

5 or deals with debt evidenced by notes, bonds,

6 or other securities sold by the Company and

7 capitalized leases, unless subordinated or

8 unless a trade credit. The letters of credit

9 are clearly not trade credit. By their

10 terms, they are not to be subordinated. They

11 constitute a written promise to pay, which is

12 the equivalent of a bond, and clearly fall

13 within the scope of the definition of "Senior

14 Indebtedness."

15 So in conclusion, Your Honor, using

16 the plain meaning within the four corners of

17 these various contracts, it is I think

18 crystal clear these claim were all properly

19 classified by the Debtors as senior debt on

20 Amended Schedule S.

21 If Your Honor has no further

22 questions, I would respectfully ask that you

23 overrule the Objection.

24 MS. KRIEGER: Good morning, Your

25 Honor. Arlene Krieger from Stroock & Stroock

1 Proceedings

2 & Lavan on behalf of Bayerische Hypo-Und
3 Vereinsbank AG, which I will refer to as
4 "HVB" in this presentation.

5 Just to give a little bit of
6 background, prior to the Petition Date, Enron
7 and HVB entered into a Master Letter of
8 Credit and Reimbursement Agreement, which was
9 amended from time to time. Pursuant to this
10 Reimbursement Agreement, Enron had the
11 ability to request and did request that HVB
12 issue a number of letters of credit to
13 support the performance of obligations of
14 Enron or its subsidiaries to various
15 third-party beneficiaries. Like Chase, it is
16 a way of providing credit support, a kind of
17 financing tool.

18 Three of the letters of credit were
19 fully drawn prior to the Petition Date, and
20 HVB paid the respective beneficiaries of
21 those LLCs. The result, Your Honor, is that
22 HVB advanced \$81 million for the benefit of
23 Enron and has claims for that principal
24 amount, plus claims for outstanding fees and
25 other obligations under the Reimbursement

1 Proceedings

2 Agreement. One letter of credit in the
3 principal amount of \$32.5 million remains
4 outstanding and, if drawn, would further
5 increase the amount of HVB's claims against
6 Enron in their Reimbursement Agreement.

7 JUDGE GONZALEZ: Speak louder,
8 please.

9 MS. KRIEGER: Sorry, Your Honor. I
10 will try.

11 Your Honor, as has been indicated,
12 the Schedule S initially, as put forward by
13 Enron, provided for Letter of Credit Claims,
14 claims arising from and relating to the
15 issuance of letters of credit to be entitled
16 to the subordination provisions of each of
17 the Subordination Agreements at issue. Then
18 in the interim, between the time that they
19 filed their initial Schedule S and they filed
20 the Amended Schedule S, they had spent a
21 great deal of time, one assumes, looking
22 through that list and decided, again, that
23 Letter of Credit Claims or at least certain
24 Letter of Credit Claims, including HVB's
25 claims, were entitled to all of those

1 Proceedings

2 subordination benefits. HVB will only
3 address the Letter of Credit Claims. It does
4 not have any Intercompany Claim issues here.

5 I will join with the arguments that
6 have already been made and won't reiterate
7 those by John Hancock and Chase with respect
8 to the burden of proof that was argued by
9 Baupost. We think that that is not correct
10 and not supported. This is a different
11 circumstance, and I would argue as well, Your
12 Honor, that the Best Products case that was
13 cited to by Baupost does not stand for that
14 proposition. In fact, in that case there was
15 no disagreement or issue with respect to the
16 interpretation of the Subordination
17 Agreement.

18 Your Honor, we believe that we
19 belong on Schedule S. When Baupost filed
20 their objection, obviously, we filed a
21 response challenging those issues. They only
22 filed a pleading which challenged the HVB
23 claims with respect to the 1987 Indenture and
24 the TOPRS Indentures. They did not challenge
25 the senior position of the HVB claims with

1 Proceedings

2 respect to the 1993 Loan Agreement nor the
3 1994 Loan Agreement.

4 With respect to the 1987 Indenture,
5 Your Honor, we disagree with Baupost's
6 arguments. You have heard a lot of this
7 already, Your Honor, so forgive me. But two
8 of the arguments that they make are: that
9 the LLC claims are indirect guarantees or a
10 contingent obligation. Our Reimbursement
11 Agreement, which was annexed to our pleading,
12 clearly reflects the fact that Enron's
13 indebtedness to HVB for the amount of any
14 draw on a letter of credit is direct and
15 unconditionally payable. Again, there is no
16 contingency here. Once the Bank issues a
17 letter of credit, the commitment is there.
18 There is no contingent obligation. There is
19 an absolute obligation to pay. The only
20 thing that is uncertain is what the amount
21 is, if any, that will have to be paid.

22 Your Honor, if Enron's indebtedness
23 to HVB was contingent, for example, on XYZ
24 Corp. not satisfying a payment obligation to
25 HVB, in that instance Enron's obligation to

1 Proceedings

2 HVB would be contingent. But that is not the
3 circumstance that we have here.

4 I would further join with Chase's
5 argument. If you look at subsection (4) of
6 the indebtedness provision of the 1987
7 Indenture, there are specific types of
8 agreements which are indicated as being those
9 kinds of conditional obligations and
10 contingent guaranty circumstances and an
11 obligation under a reimbursement obligation
12 for repayment of amounts, which are drawn
13 under a letter of credit, just don't fit into
14 that scenario.

15 So, Your Honor, we think that there
16 is no basis to find that HVB's claims fall
17 within the exclusion and, thereby, precludes
18 HVB from constituting indebtedness for
19 purposes of the Senior Indebtedness
20 definition.

21 With respect to its being an
22 instrument, Your Honor, Baupost, as you have
23 heard, proffered other definitions and looked
24 to the UCC. It looked to a commercial law
25 definition in Black's Law Dictionary. While

1 Proceedings

2 those things just are not applicable, the
3 commercial law definition, Your Honor, is
4 applicable to UCC sale of goods situations.
5 That is not what we have here, again. So
6 that is not of relevance. Rather, the
7 Reimbursement Agreement is what Black's Law
8 says as its plain, ordinary meaning
9 definition of the word "instrument." "A
10 written legal document that defines rights,
11 duties, entitlements or liabilities, such as
12 a contract." The Reimbursement Agreement is
13 clearly a contract.

14 Your Honor, we think on the third
15 prong, although Baupost has not raised that
16 today, of what is required to meet the
17 "indebtedness" or "Senior Indebtedness"
18 definitions for the 1987 Indenture, is that
19 it is for the repayment of money borrowed.
20 We think that there is no argument here with
21 respect to that. Obviously, letters of
22 credit are regarded as the functional
23 equivalent of loans. When HVB issues the
24 LOCs, the loan commitment is made. When LOCs
25 are drawn and HVB had to make payment, the

1 Proceedings

2 actual loan is issued, and Enron has an
3 absolute obligation under the terms of the
4 Reimbursement Agreement to repay that loan.

5 So in sum, Your Honor, we think
6 that the HVB claims under the 1987 Indenture
7 properly meet the definition of "Senior
8 Indebtedness."

9 We will further point out, not to
10 get into extrinsic evidence, but the
11 Reimbursement Agreement itself reflects in
12 the subordinated debt definition that is in
13 that agreement that Enron's obligations to
14 HVB are superior to Enron's obligations to
15 the Subordinated Debentures issued under the
16 1987 Indenture.

17 Moving to the TOPRS Indentures,
18 Your Honor, we also think quite clearly that
19 HVB meets the "Senior Indebtedness"
20 definitions here. The key terms are that its
21 principal due, all indebtedness of Enron,
22 other than any obligations to trade creditors
23 evidenced by notes, debentures, and bonds,
24 unless in the case of any particular
25 indebtedness, it says it is subordinated to

1 Proceedings

2 or is pari passu with the securities.

3 Your Honor, we believe that the
4 type of financial obligation created was
5 intended to qualify as Senior Indebtedness
6 under the TOPRS. Black's Law Dictionary
7 defines a bond to mean, in relevant part, an
8 obligation, or promise, or a written promise
9 to pay money if certain circumstances occur.
10 The Reimbursement Agreement squarely falls
11 within this definition, as that agreement
12 evidences Enron's written obligation to pay
13 money to HVB when a letter of credit is
14 drawn.

15 The TOPRS Indentures, the "Senior
16 Indebtedness" definition in that indenture,
17 specifically excludes, as I said,
18 indebtedness to trade creditors and
19 indebtedness for those financial obligations
20 where the instrument provides otherwise. The
21 indebtedness created under the Reimbursement
22 Agreement is financial. It is not trade
23 debt, and there are no provisions in the
24 Reimbursement Agreement either subordinating
25 such indebtedness to the TOPRS or stating

1 Proceedings

2 that such indebtedness under the
3 Reimbursement Agreement is pari passu with
4 the TOPRS Debentures.

5 We would also join with the
6 arguments that Chase made in connection with
7 distinguishing the "or other securities sold
8 by Enron for money borrowed" language. We
9 don't think that that qualifies the term
10 "notes or bonds" and, therefore, is not at
11 issue here to disqualify HVB's Reimbursement
12 Agreement.

13 We, therefore, argue, Your Honor,
14 and submit that HVB's claims constitute
15 Senior Indebtedness under the TOPRS
16 Indentures and are entitled to the benefits
17 of that indenture's contractual subordination
18 provisions.

19 Your Honor, we don't believe that
20 we need to address the 1993 and 1994 Loan
21 Agreements, because Baupost has not put in
22 any Objection to those. So we think that
23 those are properly on Schedule S as senior
24 debt.

25 Thank you.

1 Proceedings

2 JUDGE GONZALEZ: Is there anyone
3 else responding?

4 All right. Mr. Winston, you have
5 five minutes for your response.

6 MR. WINSTON: Thank you, Your
7 Honor. I will try to keep it even shorter
8 than that.

9 Unless Your Honor has an objection,
10 I am just going to go by indenture on the
11 open issues and just highlight some of the
12 flaws in the arguments that I have heard
13 today.

14 With respect to the 1987 indenture,
15 the first open issue is what is meant by
16 "corporation," and counsel for JPMorgan cited
17 to what the indenture says. But the
18 interesting thing is the definition of
19 "corporation" (1) uses the word "includes."
20 It doesn't say "it is limited to." It uses
21 the word "includes," and it says
22 "corporations, voluntary associations, joint
23 stock companies, and business trusts." So by
24 that term alone, it is already broader than
25 just a corporation and it uses the word

1 Proceedings

2 "includes."

3 The next step from that is a
4 limited liability company. So for purposes
5 of understanding what is meant by the term
6 "corporation," Enron Finance, a limited
7 liability company, should count.

8 The next question is the change in
9 voting control. If I understand the argument
10 correctly, if voting control passes to a
11 third party of an Enron affiliate, for all
12 purposes in the future that affiliate does
13 not count as a Subsidiary for the 1987
14 Indenture. So any time in the past, where
15 someone had voting control of that Enron
16 affiliate, and it was able to vote to put a
17 director on, it will never become a
18 Subsidiary, even though Enron may end up
19 having full voting control. That makes no
20 sense. If at some point voting control
21 passes back into the hands of Enron, it
22 should be counted as a Subsidiary for
23 purposes of that indenture. That was the
24 intent of the exclusion, and I have heard
25 nothing to suggest otherwise.

1 Proceedings

2 Now, for Cherokee, it never
3 happened. Cherokee always had a third party
4 controlling or having voting control of that
5 entity. So I have no argument there. But
6 with respect to EEC, which was not included
7 on Schedule S for the 1987 Indenture and for
8 purposes of Enron Finance, it should be the
9 same result.

10 With respect to the letter of
11 credit arguments on the 1987 Indenture, after
12 arguing that you should look to the entire
13 intent of the document or look at the entire
14 document, HVB and Chase want you to ignore
15 the actual language where it says "notes,
16 bonds, debentures, or other instruments."
17 They use a definition of "bond" taken from
18 Black's Law Dictionary, which does not have
19 any connection to the context of the
20 definition of Senior Indebtedness in the 1987
21 Indenture. "Notes, bonds, debentures or
22 other instruments," doesn't include
23 contracts. This is a contract to reimburse
24 an obligation owed to a third party. If it
25 wanted to include contracts, it certainly

1 Proceedings

2 could have said that. But it is very limited
3 in what it is using. So to suggest that just
4 because a contract may in certain
5 circumstances be called an "instrument" or
6 may be called a "bond," it is not what was
7 intended in this document based upon the
8 plain language of the document. But even if
9 the Court disagrees with me, I don't
10 understand how the conditional obligation
11 exclusion doesn't apply here.

12 At the moment the Letter of Credit
13 Reimbursement Contract was executed, there
14 was a condition to it. The condition is the
15 letter of credit has to be drawn. Listening
16 to HVB's argument, she skipped over that
17 step, knowing that that is the flaw in the
18 argument. The commission may never come to
19 pass. The letter of credit may never have
20 been drawn, or it may be drawn only
21 partially, which I think is the case for some
22 of these letters of credit. They may be
23 fully drawn. But at the moment that
24 obligation is created, it is a conditional
25 obligation. What else was intended by that

1 Proceedings

2 provision?

3 With respect to the TOPRS, with
4 respect to the Intercompany Claims, it turns
5 on what was meant by "sold by." They have
6 argued that the "sold by Enron" applies only
7 to the term "securities." That, again, is
8 taking the language out of context. It says
9 "notes, bonds, debentures or other securities
10 sold by Enron." The use of the term "other
11 securities" suggests, under the principles
12 that we have cited, that the "notes, bonds,
13 and debentures" are meant to be "other types
14 of securities" -- they just didn't say them
15 all -- and they have to be sold by Enron.
16 These weren't. I agree. This an atypical
17 indenture, but I have to go with what the
18 language says. I am a little surprised at
19 it. I also am surprised it wasn't an
20 expressed exclusion of Intercompany Claims,
21 like there was in the 1987 Indenture. I
22 don't think most indentures have that, but
23 this one is atypical. It still has to be
24 sold by Enron. It has to be the type of
25 thing sold by Enron. There were many

1 Proceedings

2 obligations that were, in fact, sold by
3 Enron, one of which we have conceded today,
4 the Enron Equity Corporation Notes were, in
5 fact, sold by Enron.

6 Again, with respect to the Letter
7 of Credit Claims, it does not make sense to
8 even paint these things as "notes, bonds,
9 debentures, or other securities." Under any
10 circumstances, a letter of credit is not a
11 security. That makes no sense whatsoever and
12 it clearly wasn't sold by Enron.

13 I can't understand why they used
14 this language in the TOPRS Indentures, but it
15 is not ambiguous. Therefore, as my opposing
16 counsel have already articulated, if the
17 language is unambiguous, you must follow it.

18 After saying that, I go to the 1993
19 and 1994 Loan Agreements. I still submit
20 that the term "indebtedness" is ambiguous as
21 used in that document. As we have already
22 seen in the two other indentures, the term
23 "indebtedness" is not universal for every
24 obligation Enron has. There are exclusions
25 to it.

1 Proceedings

2 Now, unfortunately, the documents
3 that were executed between Enron and its
4 affiliate don't have any express exclusions
5 or express inclusions. This Court can't
6 conclude that "all indebtedness" means
7 literally everything -- trade claims, to the
8 extent that someone could argue they
9 constitute money borrowed; the Intercompany
10 Claims; and even the Letter of Credit Claims,
11 because we have not objected to them, because
12 we didn't want to go through the brain damage
13 of trying to figure all of that stuff out.
14 But I have got to believe that, because that
15 term is subject to other interpretations, it
16 is possible that, as a counsel for Chase
17 argued, the holder of the obligation is what
18 matters. They intended to exclude
19 Intercompany Claims.

20 I would submit to Your Honor that
21 under most indentures, Intercompany Claims
22 are excluded. This one didn't expressly do
23 it. I can see that point. But that
24 provision or that term is subject to more
25 than one reasonable interpretation, and parol

1 Proceedings

2 evidence will tell us what is really meant by
3 it.

4 That is all I have to say, Your
5 Honor.

6 JUDGE GONZALEZ: All right. Thank
7 you. I will take it under advisement.

8 I am going to take a brief recess.
9 Those of you who haven't given your
10 appearances for the balance of the calendar,
11 please do so.

12 (Whereupon, from 11:59 a.m. to
13 12:06 p.m. a recess was taken.)

14 JUDGE GONZALEZ: Let me just check
15 what remains on the calendar.

16 All right. Mr. Smith, you are here
17 on the various settlements?

18 MR. SMITH: I am, Your Honor, on
19 two groups. Thirteen uncontested 9019s and
20 the California settlement is on at 11:55 as
21 well.

22 JUDGE GONZALEZ: All right. Let's
23 skip that. I apologize for those matters
24 that were skipped over, but if we are going
25 to get these Orders entered today, I need